NO. 83-5933

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LUIS GARCIA,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS

BRIEF FOR RESPONDENT IN OPPOSITION

NEIL F. HARTIGAN,
Attorney General,
State of Illinois,
188 West Randolph Street
Suite 2200
Chicago, Illinois 60601

Attorney for Respondent.

RICHARD M. DALEY,
State's Attorney,
County of Cook,
Room 500, Richard J. Daley Center,
Chicago, Illinois 60602
MICHAEL E. SHABAT,
JOAN S. CHERRY,
DEAN P. KARLOS,
Assistant State's Attorneys,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LUIS GARCIA,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS

BRIEF FOR RESPONDENT IN OPPOSITION TO THE GRANTING OF THE WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Supreme Court of Illinois in this case was entered on June 17, 1983, and a petition for rehearing was denied on September 30, 1983. The opinion of the Supreme Court of iiiinois is reported at 97 iii. 2d 58, 454 N.E.2d 274.

JURISDICTION OF THE COURT

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. sec. 1257(3).

QUESTIONS PRESENTED FOR REVIEW

Whether the death sentence is constitutional where petitioner's intent to kill is inferred from the facts as well as specifically found by the trier of fact.

Whether the Illinois death sentence statute procedures properly guide and inform the sentencing jury in weighing and balancing all factors without placing any burden of proof on petitioner.

Whether the prosecutor's reference to petitioner's chance for parole was invited comment and had no effect on the jury.

Whether the Eight and Fourteenth Amendments require proportionality review of petitioner's death sentence.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW..... i

AUTHORITIES CITED..... iii

OPINION BELOW..... 1

JURISDICTION OF THE COURT..... 1

STATEMENT OF THE CASE..... 2

REASONS FOR DENYING THE WRIT..... 4

I.

PETITIONER'S DEATH SENTENCE IS CONSTITUTIONAL UNDER THIS COURT'S DECISION IN ENMUND V. FLORIDA WHERE HIS INTENT TO KILL WAS NOT ONLY PROPERLY INFERRED FROM THE FACTS BUT WAS SPECIFICALLY FOUND BY THE TRIER OF FACT..... 4

II.

THE ILLINOIS DEATH SENTENCE STATUTE FULLY COMPORTS WITH CONSTITUTIONALLY MANDATED PROCEDURES BY GUIDING AND INFORMING THE SENTENCING JURY IN ITS WEIGHING AND BALANCING OF ALL FACTORS WITHOUT PLACING UPON PETITIONER ANY BURDEN OF PROOF AT ANY PHASE OF THE SENTENCING HEARING..... 7

III.

THE PROSECUTOR'S CLOSING ARGUMENT REGARDING PETITIONER'S CHANCE FOR PAROLE WAS INVITED COMMENT AND DID NOT HAVE ANY EFFECT ON THE SENTENCING JURY..... 9

IV.

PROPORTIONALITY REVIEW OF PETITIONER'S DEATH SENTENCE IS NOT NECESSARY ACCORDING TO PULLEY V. HARRIS WHERE PROCEDURES UNDER THE ILLINOIS STATUTE PRECLUDE THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH SENTENCE..... 10

CONCLUSION..... 11

AUTHORITIES CITED

CASES:

California v. Ramos, __ U.S. __, 103 S.Ct. 3446 (1983)..... 9

Clark v. Louisiana State Penitentiary, 694 F.2d 75 (5th Cir. 1982) (distinguished)..... 5, 6

Eddings v. Oklahoma, 455 U.S. 104, 71 L.Ed.2d 1, 102 S.Ct. 869 (1982)..... 8

Enmund v. Florida, 458 U.S. 782, 73 L.E.2d 1140, 102 S.Ct. 3368 (1982)..... 4, 5, 6

Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976)..... 7

Jones v. Illinois, ___ U.S. ___, ___ L.Ed.2d ___, ___ S.Ct. ___, 34 Crim. L. Rep. 4047 (Oct. 9, 1983) (distinguished)..... 8

People v. Koshiol, 45 Ill. 2d 573, 262 N.E.2d 446 (1970), cert. denied, 401 U.S. 978 (1970)..... 4

People v. Kubat, 94 Ill. 2d 437, 447 N.E.2d 247 (1983)..... 10

People v. Jones, 94 Ill. 2d 275, 447 N.E.2d 161 (1983)..... 9

People v. Myers, 35 Ill. 2d 311, 220 N.E.2d 297 (1966), cert. denied 385 U.S. 1019 (1967)..... 9

People v. Ruiz, 94 Ill. 2d 245, 447 N.E.2d 148 (1982)..... 4

People v. Walker, 91 Ill. 2d 502, 440 N.E.2d 83 (1982)..... 9

Presnell v. Georgia, 439 U.S. 14, 58 L.Ed.2d 207, 99 S.Ct. 235 (1978) (distinguished)..... 5

Pulley v. Harris, ___ U.S. ___, ___ L.Ed.2d ___, ___ S.Ct. ___, 52 L.W. 4141 (Jan. 24, 1984)..... 10

Zant v. Stephens, ___ U.S. ___, 77 L.Ed.2d 235, 103 S.Ct. 2733 (1983) (distinguished)..... 9

STATUTES:

Ill. Rev. Stat. 1979, ch. 38, sec. 9-1..... 2, 7

STATEMENT OF THE CASE

Petitioner was convicted after a jury trial of four counts of murder, as well as various counts of attempt murder and other crimes. (T.R.C.12-C69) The same jury voted to impose the death sentence on petitioner after finding, beyond a reasonable doubt, that he had been convicted of two or more murders. (T.R.C8-C9)

Evidence at trial was sufficient to support the inference that petitioner actually killed three individuals. The jury found him guilty of four counts of murder after receiving a general instruction on those charges. (T.R.C4-C7) The general instruction stated that petitioner is guilty of murder if he, or one for whose conduct he is responsible, kills an individual and: intended to kill or do great bodily harm or knows such acts will cause death; or knows such acts create a strong probability of death or great bodily harm; or attempts or commits a forcible felony. (T.R. 897-904) There was no determination that petitioner was guilty only by accountability, a contention rejected by the Illinois Supreme Court in the opinion below.

Petitioner and his accomplice robbed a grocery store and killed three persons therein. A fourth person, an attempt murder victim, testified that petitioner shot and killed one of the victims at the front of the store by the cash register. (T.R. 595-608) Later at a tavern, petitioner shot two attempt murder victims at the front by the cash register before taking money from it. (T.R. 364-369, 436-437, 465-469) Petitioner drove the getaway car in a high-speed police chase after sexually abusing the 10-year-old daughter of one of the attempt murder victims. (T.R. 370-374) Petitioner shot that victim while the child watched. (T.R. 437) Ballistics evidence proved that the three murder victims at the grocery store and the two attempt murder victims at the tavern had been shot with the same .38 revolver found on the driver's seat of the car petitioner drove. (T.R. 575, 673-683) The revolver used to shoot one murder victim and the one attempt murder victim at the grocery store, and the one murder victim at the tavern was found next to petitioner's accomplice in an alley after he had been killed in a police shoot-out. (T.R. 643, 673-683)

At the death penalty hearing, the judge instructed the jury on aggravating and mitigating factors, and how to weigh and balance them. (T.R. 1162-1169) The instructions were consistent with the language of the Illinois death penalty. Ill. Rev. Stat. 1979, ch. 38, sec. 9-1.

During closing argument at the death penalty hearing, the defense attorney stated that petitioner could be sentenced to life imprisonment without parole. Later, the prosecutor responded that if petitioner were given life imprisonment he would find a way to get out on parole and kill again.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I.

PETITIONER'S DEATH SENTENCE IS CONSTITUTIONAL UNDER THIS COURT'S DECISION IN ENMUND V. FLORIDA WHERE HIS INTENT TO KILL WAS NOT ONLY PROPERLY INFERRED FROM THE FACTS BUT WAS SPECIFICALLY FOUND BY THE TRIER OF FACT.

Petitioner erroneously concludes that the trier of fact must make the specific finding that he personally possessed the specific intent to kill before the sentencing body can impose the death sentence. In so arguing, petitioner clearly ignores well-established case law that intent to kill may be inferred from the facts, and that such inferred intent, or an attempt to kill, or contemplation that death producing acts would occur is sufficient in this case to justify the death sentence.

At trial, the jury was given the general instruction on the charge of murder that petitioner is guilty if he actually committed the murders or is legally responsible under the Illinois accountability statute for the conduct of the perpetrator. The jury was also instructed on the charges of attempt murder, which provided that petitioner is guilty if he makes a substantial step to commit murder with the specific intent to commit that offense. The jury returned guilty verdicts on both charges. At the death penalty hearing, the jury found the aggravating factor that petitioner had been convicted of two or more murders.

Petitioner clearly ignores this Court's decision in Enmund v. Florida, 458 U.S. 782, 73 L.Ed.2d 1140, 102 S.Ct. 3368 (1982). This Court noted that a convicted murderer who does not actually kill may be given the death sentence if he intended to kill, attempted to kill, or contemplated that life would be taken. Id., 458 U.S. at ___, 102 S.Ct. at 3378. Based upon the facts of this case, petitioner clearly intended and contemplated that lethal force would be employed. It is well-established that intent to kill may be inferred from a person's acts. People v. Ruiz, 94 Ill. 2d 245, 447 N.E.2d 148 (1982); People v. Koshiol, 45 Ill. 2d 573, 262 N.E.2d 446 (1970), cert. denied 401 U.S. 978 (1970). Even Justice White's concurring opinion in Lockett v. Ohio, 438 U.S. 586, 621-28, 57 L.Ed.2d 973, 1000-04, 98 S.Ct. 2954, 2981-85 (1978), upon which petitioner relies heavily, recognizes that intent may be inferred from the facts of a case. See People v. Ruiz, supra, 94 Ill. 2d at 263 (1982). Accord-

ingly, even if petitioner was convicted of murder on the basis of accountability, a premise with which the Illinois Supreme Court disagreed in the opinion below (People v. Garcia, 97 Ill. 2d 58, 84 (1983)), no specific finding by the jury that he had an intent to kill was required. To conclude otherwise, would abrogate guilt of any crime by accountability.

Moreover, contrary to petitioner's erroneous contention, the jury found he possessed a specific intent to kill by finding him guilty of attempt murder. Not only does that verdict meet petitioner's proposed, yet legally incorrect, standard but meets one of the criteria this Court set out in Enmund to justify the death sentence for one who is guilty of murder by accountability.

Petitioner's use of Presnell v. Georgia, 439 U.S. 14, 58 L.Ed.2d 207, 99 S.Ct. 235 (1978) and Clark v. Louisiana State Penitentiary, 694 F.2d 75 (5th Cir. 1982) are clearly misplaced. In Presnell, defendant was convicted of murder and rape. However, because the jury did not specify whether the rape was forcible or statutory, the Georgia Supreme Court interpreted the rape conviction as statutory. Defendant was later sentenced to death. The aggravating factor was that defendant committed murder while engaged in kidnapping with bodily harm, which bodily harm was based upon the rape conviction. This Court vacated the death sentence and remanded the case because the rape conviction was not a forcible act and, thus, could not constitute an element of the aggravating factor. Presnell, supra, 439 U.S. at 236.

Distinctions between petitioner's case and Presnell are obvious. Here, every element of the jury's guilty verdict of murder was met, whether he actually committed the murders or was accountable for them. Petitioner's aggravating factor of being convicted of two or more murders was met because he was properly convicted of four murders. Hence, there was never any due process violation in light of Presnell.

Petitioner avers that the Court of Appeals in Clark, supra, addressed an issue not disposed of in Enmund. Yet, a careful reading of Clark reveals it is merely an application of Enmund to similar facts. In Clark, defendant and an accomplice conspired to commit robbery. During the robbery the co-conspirator committed murder. Defendant was convicted of both robbery and murder by conspiracy and sentenced to death. The issue according to the Court of Appeals was whether the State was relieved of its burden of proving defendant's specific intent to kill "without aid of any imputation from a lesser crime or the act of another." Clark, supra, 694 F.2d at 76. That court re-

versed both the death sentence and murder conviction because the jury might have misapprehended the conspiracy instruction. The jurors could have concluded that, because of the conspiracy to rob, any act of the co-conspirator, including murder, must be deemed intended by defendant. Clark, supra, 694 F.2d at 76-78.

Clark is fully consistent with Enmund and does not address a different issue. In Enmund this Court held that the death sentence cannot be imposed on a defendant who, at most, was an accomplice in a robbery and not to the resulting murder where he did not intend to kill or contemplate the taking of life. Indeed, the Court of Appeals in Clark recognizes the consistency of the issue addressed in both cases. Id., 694 F.2d at 76-77.

Petitioner's death sentence is constitutional under the decisions of this Court where he intended to kill, attempted to kill, and contemplated life would be taken. For that reason, the Petition for a Writ of Certiorari should be denied.

THE ILLINOIS DEATH SENTENCE STATUTE FULLY COMPORTS WITH CONSTITUTIONALLY MANDATED PROCEDURES BY GUIDING AND INFORMING THE SENTENCING JURY IN ITS WEIGHING AND BALANCING OF ALL FACTORS WITHOUT PLACING UPON PETITIONER ANY BURDEN OF PROOF AT ANY PHASE OF THE SENTENCING HEARING.

Petitioner erroneously interprets the Illinois death sentence statute as creating a presumption that death is the appropriate sentence and that he bears a burden to rebut that presumption. Petitioner plainly misapprehends the nature of the death sentence hearing and relevant case law supporting the constitutionality of the hearing procedures.

Like the Florida statute, the Illinois statute requires the State to establish beyond a reasonable doubt the existence of any aggravating factor to make petitioner eligible for the death sentence. That is the only stage in which any party has a burden of proof. Thereafter the sentencing body shall, once again, consider aggravating factors, but now in conjunction with any mitigating factors in the balancing stage. The sentencing body must then unanimously determine that there are no mitigating factors sufficient to preclude imposition of the death sentence before it may impose it. Ill. Rev. Stat. 1979, ch. 38, sec. 9-1.

The procedures provided in the Illinois statute fully comport with the requirement enunciated by this Court in Proffitt v. Florida, 428 U.S. 242, 49 L.Ed.2d 913, 96 S.Ct. 2960 (1976) and Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976), that the sentencing body be guided and informed in its weighing and balancing of all factors, but without being relegated a perfunctory and mechanical task. These procedures legitimately broaden the function of the sentencing body beyond that of a trier of fact to allow consideration of petitioner's character and propensities. See Gregg v. Georgia, supra.

In arguing that the Illinois statute requires a defendant to refute a presumption that the death sentence is appropriate, petitioner clearly ignores the required weighing and balancing of all factors by the jury. Indeed, the jury obviously understood that the State, rather than petitioner, bore a burden of proof by being required to establish the existence of an aggravating factor prior to the weighing and balancing phase of the hearing. Even if petitioner

had never presented any mitigating evidence, the jury would still have been required to weigh and balance all evidence before it could impose the death penalty. Accordingly, petitioner's contention that he bears any burden of proof is clearly unfounded.

Petitioner cites the dissent in the denial of certiorari in Jones v. Illinois, ___ U.S. ___, L.Ed.2d. __, __ S.Ct. __, 34 Crim. L. Rep. 4047 (Oct. 9, 1983) in support of his contention. Not only did this Court reject such a contention by denying certiorari, but that case involved an allegedly improper jury instruction that was never given to the jury in petitioner's death sentence hearing. In Jones, the judge instructed the jury that it must determine whether mitigating evidence "has taken away" the aggravating factors. However, in petitioner's case, the judge instructed the jury that it should consider any aggravating and mitigating factors, and that the latter includes "any other facts or circumstances." (T.R. 1161-1162) See Eddings v. Oklahoma, 455 U.S. 104, 71 L.Ed.2d 1, 102 S.Ct. 869 (1982). The jury was never given even the most subtle indication that petitioner bore any burden of proof to dissuade the jury from imposing the death penalty.

For these reasons, petitioner's Petition for a Writ of Certiorari should be denied.

III.

THE PROSECUTOR'S CLOSING ARGUMENT REGARDING PETITIONER'S CHANCE FOR PAROLE WAS INVITED COMMENT AND DID NOT HAVE ANY EFFECT ON THE SENTENCING JURY.

The prosecution's death penalty phase closing argument regarding petitioner's chance for parole clearly was invited by the defense closing argument. Defense counsel assured the jury that the judge would sentence petitioner to life imprisonment without the possibility of parole. The prosecutor countered by arguing that petitioner would find a way to get out on parole and kill again. Further, the jury was properly informed that petitioner committed his murders while on parole for a previous unrelated offense. Later, the judge instructed the jury that closing arguments are not evidence and should be disregarded.

The prosecutor's comment was invited by the defense's prior comment. This is the same as the situation in People v. Jones, 94 Ill. 2d 275, 441 N.E.2d 161 (1983) where the Illinois Supreme Court rejected defendant's argument. Further, in light of the overwhelming strength of aggravating factors over mitigating factors in petitioner's death sentence hearing, as well as the judge's instructions, the comments had no effect on the jury. See People v. Walker, 91 Ill. 2d 502, 515, 440 N.E.2d 83 (1982); People v. Myers, 35 Ill. 2d 311, 335, 220 N.E.2d 297 (1966), cert. denied, 385 U.S. 1019 (1967). Moreover, this Court has held in California v. Ramos, __ U.S. __, 103 S.Ct. 3446 (1983) that a defendant's future dangerousness is a proper factor to be considered in imposing a death sentence and that the possibility of parole is a permissible factor for the jury to consider.

Petitioner's reliance on this Court's opinion in Zant v. Stephens, ___ U.S. ___, 77 L.Ed.2d 235, 103 S.Ct. 2733 (1983), clearly is misplaced. In that case the issue was whether evidence of prior crimes was improperly characterized as an aggravating factor, but was otherwise admissible during the sentencing hearing, violated any constitutional right of that petitioner. Mere invited comment of this petitioner's chance for parole not only was not presented as an aggravating factor, but did not divert the jury's consideration away from aggravating and mitigating factors.

For these reasons, this Court should deny petitioner's Petition for a Writ of Certiorari.

IV.

PROPORTIONALITY REVIEW OF PETITIONER'S DEATH SENTENCE IS NOT NECESSARY ACCORDING TO PULLEY V. HARRIS WHERE PROCEDURES UNDER THE ILLINOIS STATUTE PRECLUDE THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH SENTENCE.

Proportionality review by Illinois courts comparing petitioner's death sentence with sentences imposed in similar cases is not constitutionally required. Pulley v. Harris, ___ U.S. ___, ___ L.Ed.2d ___, ___ S.Ct. ___, 52 L.W. 4141 (Jan. 24, 1984). In Harris, this Court specifically held that statutory procedures used in California, as well as Florida and other states, preclude the arbitrary and capricious imposition of the death sentence without the type of comparative review petitioner claims is necessary. Id., 52 U.S.L.W. at 4143-45. The Illinois death penalty statute is virtually identical to the statutes in California and Florida in the procedures for finding aggravating factors, and weighing and balancing them against mitigating factors, as well as state appellate review. Moreover the Illinois Supreme Court has held that the fact that all death sentences are appealed directly to that Court, the fact that it scrutinizes the entire record in each case in which a death sentence has been imposed and that it carefully scrutinizes the sentencing hearing, provides meaningful comparison review. People v. Kubat, 94 Ill. 2d 437, 447 N.E.2d 247 (1983). Ill. Rev. Stat. 1979, ch. 38, sec. 9-1. Therefore, petitioner's Petition for Writ of Certiorari should be denied.

CONCLUSION

The People of the State of Illinois respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

NEIL F. HARTIGAN,
Attorney General,
State of Illinois,
188 West Randolph Street
Suite 2200
Chicago, Illinois 60601

Attorney for Respondent.

RICHARD M. DALEY,
State's Attorney,
County of Cook,
Room 500, Richard J. Daley Center,
Chicago, Illinois 60602
MICHAEL E. SHABAT,
JOAN S. CHERRY,
DEAN P. KARLOS,
Assistant State's Attorneys,
Of Counsel.